IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 30TH NOVEMBER 2006 / 9TH AGRAHAYANA 1928

CRL.A.No. 1597 of 2006(A)

SC.593/2005 of THE COURT OF THE ADDL.SESSIONS JUDGE (ABKARI), KOTTARAKKARA.
CP.46/2004 of JUDL.MAGISTRATE OF FIRST CLASS-III, PUNALUR

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APPELLANT:

SUNDARESAN PILLAI,
C.NO.9157, CENTRAL PRISON, TRIVANDRUM.

BY ADV. ADV.GEORGE SEBASTIAN(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1597 of 2006

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Dated this the 30th day of November, 2006

JUDMENT

Acused in S.C.No.593/2005 on the file of the Court of the Addl. Sessions Judge, (Abkari), Kottarakkara is the appellant. He was charge-sheeted for the offences punishable under section 8(1) and (2) of the Abkari Act. The prosecution case against the appellant is that on 1-2-2004 at 11.30 A.M. while PW4, the then Sub Inspector of Police, Pathanapuram, along with PW3 and others on patrol duty, they got information that there was sale of arrack at Thirunilam paddy fields and when they reached there they found the appellant standing there holding a 5 litre jerry can and drinking glass. On verification, it was found that in the 5 litre jerry can contained 2 litre arrack and in another can, which was concealed in the paddy field, contained 10 litres arrack. To prove the charge against the appellant, the prosecution examined PW1 to PW4 and Exts.P1 to P4 were marked. Material objects MO1 and MO2 were also marked. When the appellant was questioned under section 313 of Cr.P.C., he denied the allegation and stated that he was falsely implicated in the case. Relying on the evidence adduced by the prosecution, the trial court found that the appellant was guilty of the offences punishable under sections 55(a) read with section 8

(1) and (2) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for a further period of three months. The above conviction and sentence are under challenge in this appeal.

2. The appeal is filed through the jail authorities. Since no counsel is appointed to defend the case of the appellant, State Brief has been appointed.

3. Learned counsel for the appellant submits that the conviction and sentence awarded against the appellant are not sustainable on three grounds; (i) the evidence adduced by the prosecution is not sufficient to prove the charge against the appellant, as none of the prosecution witnesses has identified the appellant; (ii) while seizing the contraband article and taking of the sample, the police officials have not complied with the procedure prescribed under the provisions of the Abkari Act as well as the Kerala Excise Manual and (iii) even if the evidence adduced by the prosecution is accepted, the conviction under section 55(a) of the Abkari Act is not sustainable.

4. To prove the prosecution case against the appellant, the prosecution relies on the evidence of PW3 and 4. PW4 the then Sub Inspector of Police, Pathanapuram, who detected the offence, stated that while he was on patrol duty, he got information that there was sale of arrack at Thirunilam paddy field and when he along with others reached there, they found the appellant standing there by holding a jerry can and a drinking glass. He also stated that the appellant was selling arrack to two to three persons and receiving the price. He stated that when they approached them, they ran away. He also stated that they checked the can and contents identified as arrack. He further stated that distinct samples were taken in two bottles from both the cans, sealed and seized under Ext.P1 mahazar to which PW1, PW2 and PW4 singed their signatures after the same was read over to them. He stated that the contraband articles were brought to the police station and registered a crime. He conducted the investigation and identified the appellant. The evidence of PW3 is also in tune with the evidence of PW4. It is relevant to note that the evidence of PW3 and PW4 is contradictory with regard to the presence of the persons and place of occurrence. The police had not arrested the appellant at the spot. It is also relevant to note that none of the witnesses, including PW1 andPW2, though they turned hostile to the prosecution, had not identified the appellant as the

accused. In the above circumstances, the evidence of PW3 and PW4 cannot be accepted. Hence, the finding entered by the trial court with regard to the identity of the appellant is not sustainable. .

5. The next point to be considered is whether PW3 and PW4, who prepared the documents with regard to the seizure of the contraband article and taking of the sample, have complied with the procedure prescribed under the provisions of the Abkari Act as well as the Kerala Excise Manual. It has come out in evidence that the offence was detected on 1-2-2004 at 11.30 A.M. and the contraband articles were produced before the court on 4-2-2004. In this context neither PW3 nor PW4 had explained the delay occurred in sending the residue and the sample before the court. In a decision reported in Narayani V. Excise Inspector (2002(3) KLT 725 this Court had taken a view that "**the prosecution has not proved that residue and sample were kept in the proper custody till those items were produced in court on 13-9-1995 and chance of tampering cannot be ruled out, benefit of doubt is to be given to the accused".** In Alex V. State of Kerala (2003(1) KLT SN 9) this Court had taken the view that the seizure should be reported to court forthwith. In Dominic V. State of Kerala (1989 (1) KLT 601 this Court had taken the view that "**when S.36 of the Abkari**

Act and paragraphs 17,26, 34, 49 and 77 in the Manual are read together, as they should be, it is clear that seizure should be reported to the Court 'forthwith', and request made for sending a sample for analysis'. A power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. It has come out in evidence that the contraband article was produced before the court only on 4-2-2004, after three days of the detection of the crime. No proper explanation was given by PW3 or PW4 regarding the delay. There is no evidence to show that the sample and residue were kept in the proper custody till the date of producing the same before the court. Considering the facts and circumstances of the case, this Court is of the view that the evidence adduced by the prosecution to prove the case against the appellant is not free from doubt. Hence, the procedure contemplated under the provisions of the Abkari Act as well as the Kerala Excise Manual have not been complied with by the official witnesses.

6. With regard to the third ground, this Court has already found that there was no legal acceptable evidence against the appellant to identify him as the person who is responsible for keeping MO1 and MO2. Hence, the third question need not be considered in this appeal.

7. In the above circumstances, this Court is of the view that the prosecution has failed to prove the case against the appellant beyond reasonable doubt. Hence, the benefit of doubt can be given to the appellant. Therefore, the conviction and sentence awarded against the appellant in S.C. No.593/2005 on the file of the Court of the Addl. Sessions Judge (Abkari), Kottarakkara are hereby set aside and the appellant is acquitted of the charges. Accordingly, the appellant shall be released forthwith unless required in any other case.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment

30-11-2006